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# GOODYEAR TIRE AND RUBBER COMPANY

U.S. Army Corps of Engineers  
Alternative Dispute Resolution Series

## Case Study #5

### Endispute Analysis

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***The Corps Commitment to Alternative Dispute Resolution (ADR):***

*These case studies are part of a series of case studies describing applications of Alternative Dispute Resolution (ADR). The case studies are part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These case studies are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in these case studies are designed to stimulate innovation by Corps managers in the use of ADR techniques.*

*These case studies are produced under the proponentcy of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager.*


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## Foreword

The following two studies describe and analyze the same case: The Phoenix-Goodyear Airport (PGA) Superfund Site. A mini-trial was used to resolve the relative responsibility of Potentially Responsible Parties (PRP's): the Department of Defense (DOD) and Goodyear Tire and Rubber Company. The case could prove to be an important illustration of how ADR generally and the mini-trial specifically could apply to Superfund clean-ups.

While each analysis deals with the same case, they do so from different perspectives and experience. The Endispute analysis is a post-facto examination based on interviews with the principle parties. Dr. Collins was the neutral advisor in this mini-trial and his analysis is written from that perspective and experience. Contrasting and comparing the perspectives contained in these analyses should enrich the understanding of the actual practice of ADR.



Jerome Delli Priscoli, Ph.D.  
Institute for Water Resources

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## **GOODYEAR TIRE AND RUBBER COMPANY: ENDISPUTE ANALYSIS**

→ The Phoenix-Goodyear Airport (PGA) Superfund site is located approximately 17 miles west of Phoenix, Arizona. The southern half of the site consists of adjoining properties: the Phoenix-Goodyear Airport, formerly the Litchfield Park Naval Air Facility, now owned and operated by the City of Phoenix; and the Loral Corporation plant on land owned until 1986 by Goodyear Tire and Rubber Company through a then subsidiary, Goodyear Aerospace Corporation.

→ The adjoining Navy and Goodyear facilities had been established during World War II to modify, repair and service Navy aircraft. After the War, Goodyear left the site and the Navy stayed on to preserve decommissioned military aircraft. When the Korean War broke out, Goodyear returned to its former site and manufactured airplane parts, largely under government contract, until the facility was sold in 1986. The Navy operated its facility until 1968, when it was transferred to the City of Phoenix.

In 1981, Goodyear and the Arizona Department of Health Services discovered volatile organic compounds (VOC), principally trichloroethylene (TCE), in the groundwater and soils at the PGA/Litchfield site. (TCE is a human carcinogen.) EPA added the site to the Superfund National Priorities List in 1983.

From 1983-1987, EPA conducted a Remedial Investigation and Feasibility Study (RI/FS) at the site. Following the Study, Special Notice Letters were delivered to the Department of Defense and the Goodyear Corporation identifying them as Potentially Responsible Parties (PRPs) in the cleanup of the site. The U.S. Army Corps of Engineers, through its Omaha District Office, was assigned by DOD the responsibility of acting for DOD in the investigation and negotiations. In September of 1987, EPA issued a Record of Decision (ROD), calling for remediation of the groundwater problem as the first phase in cleaning up the site. The ROD triggered a regulatory timetable for remedial actions by the PRPs. They then had 60 days to respond to EPA with a proposal for financing and undertaking the necessary remedial action. By request of the parties, this was extended to 90 days. During this time, the first attempts to negotiate a settlement were made.

### **THE ISSUES IN DISPUTE**

(S/N, F)

The major issue in contention was the relative responsibility of each of the PRPs (DOD and Goodyear) for the TCE contamination. The resolution of this issue depended upon determination of the source and timing of the contamination. Each side conducted extensive investigations of its own, but the results were controversial and inconclusive. There were also few witnesses still available. Little detailed documentation remained, because the site was used for military purposes and some of the records had been destroyed or "sanitized" by Naval Security after World War II.

## NEGOTIATIONS BEFORE ADR

When the ROD was issued in September 1987, the Corps and Goodyear attempted to negotiate an agreement. Their different assessments of their respective responsibility kept them far apart on a cost-sharing formula. At the expiration of the extended 90-day period, the two sides could not reach an agreement. Goodyear submitted its own remediation plan to EPA. The Corps, as agent for DOD, observed but did not participate in the negotiation between EPA and Goodyear, pending resolution of the cost-sharing dispute. DOD knew there was a possibility of an EPA administrative order if it did not participate in the cleanup. As a result of negotiations and a desire to forestall future litigation, the parties discussed the possibility of using ADR. EPA agreed to extend the Consent Agreement deadline until May 25, 1988, to allow DOD and Goodyear to explore ADR.

## POSITIONS OF EACH SIDE PRIOR TO ADR

The Corps' evaluation was that their relative responsibility for clean-up was small. In fact, their initial offer to Goodyear when negotiations began was that the Corps would pay only 6% of the clean-up cost. They did increase their offer during the negotiations, but still maintained that the Corps responsibility was much less than 50%.

Goodyear argued that, because they were operating as contractors to the Navy and proceeding according to government specifications, the government should share equally in the responsibility for the contamination. Because of this, Goodyear claimed that they and the Corps should split the costs 50/50. But they also felt their position was weak because "the government is the government"; i.e., even though DOD is not EPA or DOJ, they are all "the government" and by definition on the same side. This put Goodyear at a disadvantage, or so they thought, in any battle with DOD.

## DECISION TO USE ADR

### RAISING THE OPTION OF ADR

The idea of using ADR was first suggested to Goodyear by its outside legal counsel, Multinational Legal Services of Washington, D.C. Specifically, Jim Tozzi of MLS, a strong proponent of ADR, suggested to Goodyear that it might be applicable in this case. Jack Mahon, the Corps Senior Counsel for Environmental Restoration, who was involved in the Goodyear negotiations, moved swiftly to gain acceptance within DOD of an ADR initiative. He knew that Lester Edelman, the Corps Chief Counsel, would be a strong supporter. Goodyear was negotiating directly with Corps Headquarters at the time and so wanted to conduct an ADR process with personnel at that level.

The Corps, however, felt strongly that negotiations should take place at the District level. This was where they felt they had the strongest technical capability. Colonel Steven West, the Omaha District Engineer who took the lead role for the Corps, had recently concluded a mini-trial with the Bechtel Corporation. He had worked with Gary

Henningsen, an attorney in the Omaha District office, on the case. This was the same team the Corps proposed to use with Goodyear.

The Corps Chief Counsel made it clear to DOD that Colonel West would have to have total authority to settle in order for ADR to work. While District Engineers have unlimited authority in contract settlements, such authority had never been granted in the area of toxic waste clean-ups. Because DOD felt Colonel West had the experience and skill to handle this case, they delegated the required authority in this instance.

## PROS AND CONS OF ADR: THE CORPS

Concern was focused on avoiding long term litigation associated with contribution actions by Goodyear. EPA/DOJ showed little inclination to go against the Corps. However, the Corps recognized that if EPA moved against Goodyear with a consent decree or an administrative order, the ability to settle would be taken out of the Corps' hands. Their assessment was therefore that an ADR procedure left them more in control of the outcome than any other available process.

On the "con" side, the technical staff at the District level were not initially in favor of ADR. They felt that their case was strong and that an ADR procedure would reflect dissatisfaction with their analysis and force the Corps to make concessions that were inappropriate. They eventually supported the ADR process.

## PROS AND CONS OF ADR: GOODYEAR

When negotiations broke down in late 1987, Goodyear assessed their alternatives as follows:

- Cooperate with EPA and sue DOD
- Do not cooperate with EPA, even if DOD refuses to come in as a PRP. This would require EPA to litigate, issue an Administrative Order, or perform the clean-up and come back to Goodyear for reimbursement.

The lawyers for Goodyear felt they were in a no-win situation with EPA. The Superfund statute put all the weight on EPA's side in any confrontation. Goodyear's lawyers felt an ADR process was their best choice, given the options.

Goodyear itself, however, was "restive" about the whole process, according to Richard Berg of MLS. They felt put upon. In their view, all of the contamination was a result of government contract work. Given that the facts were hard to ascertain, they felt a 50/50 split was the only fair outcome. In addition, they were upset with what they saw as EPA's "Gestapo-like" search procedures as the Agency sought evidence of who caused the contamination. In their view, EPA was likely to be biased in favor of DOD. However, legal counsel was able to convince Goodyear that ADR provided their best chance of generating an acceptable outcome.



## THE PRE-ADR MEETING

Colonel Steven West, the District Engineer for the Omaha District, was the principal representative for the Corps. Dr. Robert Hehir, Vice President for Government Environmental Safety and Health Assurance Programs, represented Goodyear. Colonel West called Dr. Hehir to set up a meeting to discuss the details of the proposed ADR process. The Colonel felt strongly that the elements of a successful process would include the decision-makers having the ability to make final commitment and having the willingness to settle. When he called Hehir, West made it clear that he had the authority to settle and that Hehir must have the same. In West's view, mini-trials or other forms of ADR are merely variations on existing decision-making procedures for managing complex disputes.

At the first meeting, each made an assessment of the other. Hehir felt that West was "forthright, intelligent, trustworthy, knowledgeable, and respectful of technical ability." West saw Hehir as "decisive, positive and substantive." For both men, this was decisive in going forward and proceeding with the ADR arrangements. As West remarked, he took the "commitment to proceed... [as] a desire to settle."

## CHOICE OF ADR PROCEDURE

At this meeting, West suggested the use of a mini-trial. He had experience with this procedure and felt that it fit the situation. His primary concern (and that of Hehir's as well) was that the technical and business people remain in control and not turn the reins over to the lawyers or others. In the mini-trial, the principals could maintain a high level of personal involvement and did not delegate the decision to anyone else.

Both men also felt confident that their staff people could competently present each side of the dispute. They also felt that, as principals, they could be open to new agreements.

They agreed on a three-day mini-trial procedure. West and Hehir would preside as the "decision-makers." Gary Henningsen would be the attorney presenting the Corps' case. Henry Diamond, of Beveridge and Diamond, Washington, D.C., would present the Goodyear case. (Richard Berg, Senior Counsel of Multinational Legal Services, also advised Goodyear.)

On each of their first two days, one side would lay out its case in the first three hours. West and Hehir would then use the rest of that day to ask questions of the presenters. The third day would be for deliberation of the principals and for making a decision. The men also decided, however, that they would meet "as long as it took" to settle. They backed the three days up against a weekend so as to give themselves the flexibility of more time if they needed it.

## STRUCTURE OF ACTUAL ADR AGREEMENT

The formal ADR agreement was drafted during February and March of 1988. David Schwartz from MLS, a retired claims court judge, did the drafting on the Goodyear side. Gary Henningsen worked on the Corps side.

The amount and timing of discovery was a critical issue. Goodyear requested more discovery than the Corps thought appropriate and also expected Corps staff to travel to locations around the country to search for documents. The negotiators finally agreed to limit themselves to 10 Interrogatories and 10 Requests for Admissions on the other party, and that the Corps would be obligated to provide only those records over which it had control.

The parties agreed to depose no more than five persons on the other side and to follow these up by written statements. They also agreed to a schedule for document requests and for responding to Interrogatories.

The structured agreement was difficult to hammer out; there were two written drafts by each party and one face-to-face meeting between the lead negotiators, as well as numerous phone calls. It took the intervention of the principals to finally bring about an agreement on the process.

In addition to issues of discovery, two other elements emerged as sticking points:

The scope of the mini-trial: Goodyear wanted the scope to be broad enough to encompass anything they felt pertinent to their case. The Corps wanted to limit the scope to evidence on the contamination. Henningsen finally conceded this point and allowed the scope to include any and all issues.

The specific costs that the allocation formula would apply to: The parties agreed that, rather than deal with this as a part of the ADR agreement, they would defer this to a sidebar negotiation to take place at a later time. In fact, this sidebar became extremely important and continued throughout the mini-trial itself.

The final terms of the mini-trial agreement included the following:

- the Principals participating "would have full authority to settle the dispute"
- the mini-trial "would be a nonbinding hearing process designed to inform the Principals of the position of the respective parties "on the dispute and the underlying bases of each"
- the scope of the hearing was confined to the "operable unit" set out in the EPA ROD
- the date, time limits, and location of the hearing were agreed upon and each party agreed to "exert their best efforts to reach a settlement before June 1." If no agreement was reached by that time, the ADR would be ended.
- the agreement specified that a "sidebar" agreement between the two parties would be developed to determine what specific costs were to be covered by a cost allocation agreement.
- a neutral advisor would be in their common interest and agreed to jointly approve a neutral by April 1
- limitations on the use of discovery were set, and the parties agreed to assist each other in interviewing and deposing witnesses
- the rules of evidence would not apply and informality would be the rule
- time limits and schedules for presentation were agreed upon
- each side agreed to provide a "statement of contention" as a position paper of not more than 25 pages
- there would be no transcript or recording made of the hearing, and all material was to be "a part of a settlement conference for purposes of the rules of evidence in any court, State or Federal"

## SELECTION OF THE NEUTRAL

Both sides agreed to submit names of a person to play the neutral role. Hehir and West agreed it should be someone with considerable technical expertise, as well as credibility and professional standing. Goodyear proposed Dr. Richard Collins, Director of the Institute for Environmental Negotiation at the University of Virginia. The Corps did not develop their own list, and after investigating Dr. Collins' credentials, agreed to retain his services. Collins was known to Dr. Jerry Delli Priscoli, who recommended him to the Chief Counsel, Mr. Les Edelman.

Goodyear was looking for someone with maturity and judgement. Dr. Collins met their criteria as well.

Hehir and West wanted the neutral to play a facilitative role, keeping things moving but not offering his advice unless asked. Collins ended up asking many questions during the actual proceedings, playing devil's advocate during the deliberations of the principals, and talking them through stalemates.

The process of identifying and confirming the neutral took about 60 days.

## PRIOR EXPERIENCES WITH ADR

Colonel West had conducted a mini-trial with Bechtel on a contract claim but had no ADR experience with toxic waste, as this was a new area in which the Corps was using ADR. Henningsen likewise had worked on the Bechtel case.

The MLS attorneys (Richard Berg, Dave Schwartz, Bill Hedeman), had ADR experience. However, MLS hired a trial attorney (Henry Diamond) to present the case. His previous experience had been primarily in structured negotiations of construction disputes and in non-settlement negotiation.

Dr. Hehir had not had ADR experience. He was briefed by Dave Schwartz of MLS before meeting with West.

## ADR PROCEDURE

The mini-trial was held May 19-21, 1988 in Phoenix, Arizona. On the first morning of the proceedings, the principals and the neutral advisor had breakfast together. It was the first time the three of them had met and they discussed ground rules for the proceedings and the role for the neutral during the mini-trial. Both West and Hehir were clear with Collins that they did not want him making judgments. What they wanted instead was a facilitator, someone to keep the proceedings moving and on target in a highly visibly, chairman-like way.

In the course of the mini-trial, Collins' role became very important. He became the one to ask most of the questions, as West and Hehir tried to remain distant and listen evenly to both sides. In fact, West and Hehir kept themselves quite separate from the other participants throughout the proceedings, taking meals together (with Collins) and

consciously avoiding caucusing with their respective teams. They did this in an effort to be impartial and carefully consider all the information. And they let Collins play the role of devil's advocate, asking the difficult questions both during the mini-trial and in their private deliberations.

Collins contributed in another major way as well. At the end of the second day, the disagreement of the expert testimony from each side was still hard to reconcile. Collins suggested that the experts from both sides discuss the technical information (primarily the hydrology of the site) before the principals as a panel, without the interference of Counsel. This allowed Collins, West, and Hehir to focus attention specifically on these different viewpoints and have the experts themselves explain their disagreements.

At one point in the proceedings, the principals felt it was important to visit the site and see if that disclosed any information useful to the decision. According to Collins, this visit provided visual evidence that strengthened the Corps' case and may have led to Hehir's willingness to compromise later in the discussions.

Many of the participants commented on the difference in style between the two presenting attorneys. Diamond took the words "mini-trial" literally and conducted his presentations as if in a courtroom. In his own words, he felt it to be "litigation in miniature." His approach was to refute the Corps' case through cross-examination and rebuttal.

Henningsen, on the other hand, approached the mini-trial as a problem-solving opportunity. His presentations (at first) were more like briefings, in which he tried to illuminate as much about the site as possible. The Corps had done a tremendous amount of technical preparation on this case and wanted all of the data to be shared so that the most equitable solution could be found. As the mini-trial progressed, however, Henningsen adopted more of the trial-like methods employed by Diamond. Both men agreed that it was a hard-fought case.

## THE SIDEBAR AGREEMENT

The mini-trial proceedings focused on the allocation question and the percentage of cleanup costs that each party should pay. A secondary, but very significant, issue was determining exactly what costs were to be split.

The discussions had begun months before the mini-trial itself. The Corps, with help from the DOJ, had prepared a draft agreement, but Goodyear couldn't agree to it. They responded with a revised text. Representatives of both parties met in Omaha, Nebraska on May 19, to try and work out the differences, and the negotiations were moved to Phoenix on May 20.

The deliberations continued in Phoenix, concurrently with the mini-trial but in a different room of the hotel. An entirely different set of players, all attorneys, were involved in these negotiations. They included Jack Mahon from the Corps' Office of Chief Counsel, Bill Hedeman and Dick Berg from MLS, Willy Ido from Goodyear, and Steve Calvarese from the Missouri River Division Office. By Saturday morning, after a very late session on Friday evening, most of the issues had been resolved. There were, however, still some sticking points. The negotiators turned these over to the principals in the mini-trial and they made the final decision on these last issues.

Several participants commented on the importance and uniqueness of these negotiations. To their knowledge, they were operating in the dark, with no model of how this kind of negotiation should proceed. Goodyear took a strong position that the sidebar had to be settled before they could agree to any share of costs. This put on a lot of pressure to work through these parallel negotiations quickly, so as to be completed before the conclusion of the mini-trial.

A significant piece of these negotiations were the issues left unresolved until the end. There was much uncertainty in the data being used to identify costs, and where the uncertainty was too great, the negotiators passed the decision on to the principals. They folded these last critical decisions into their deliberations on Saturday, May 21.

## THE SETTLEMENT

The presenters gave their summary statements on Friday afternoon, May 20. On Friday evening, West, Hehir, and Collins met together to begin their deliberations. They were not able to reach any agreement that evening; they spent most of that time reviewing the presentations and steered clear of putting any numbers on the table.

They convened early the next day. Collins played a critical role in these discussions by providing a critique of each side's case. After several hours, they were still far apart, and it was not clear that agreement was going to be found. Each principal "took a walk" with the neutral, to test out perceptions and possible percentages before proposing them to the other side.

Late in the day, West and Hehir reached an agreement. In Hehir's words, they both recognized this to be a "business decision," in which it was "better to do something rather than nothing." Hehir had been willing to give in a bit on the issues in the sidebar agreement, and this may have helped set the tone for agreement on the cost allocation. The final decision was for the Corps to pay 33% of the costs, and Goodyear to pay 67%. The agreement was contingent on Goodyear agreeing to the consent decree with EPA, which they were willing to do.

## EVALUATION

All of the participants felt that the outcome of the mini-trial was acceptable. Each was, of course, hoping for more. After hearing all of the information presented at the mini-trial, each party and attorney felt that the settlement was within a reasonable range of their desired outcome.

Everyone was also satisfied with the process. The principals in particular both felt that the procedure had worked well. They each felt the other had discharged his responsibility admirably and that the resulting decision was the very best that could have been achieved. The relationship between the principals was an important element in this mini-trial, and many of the participants felt that this was the most important ingredient in the procedure's success.

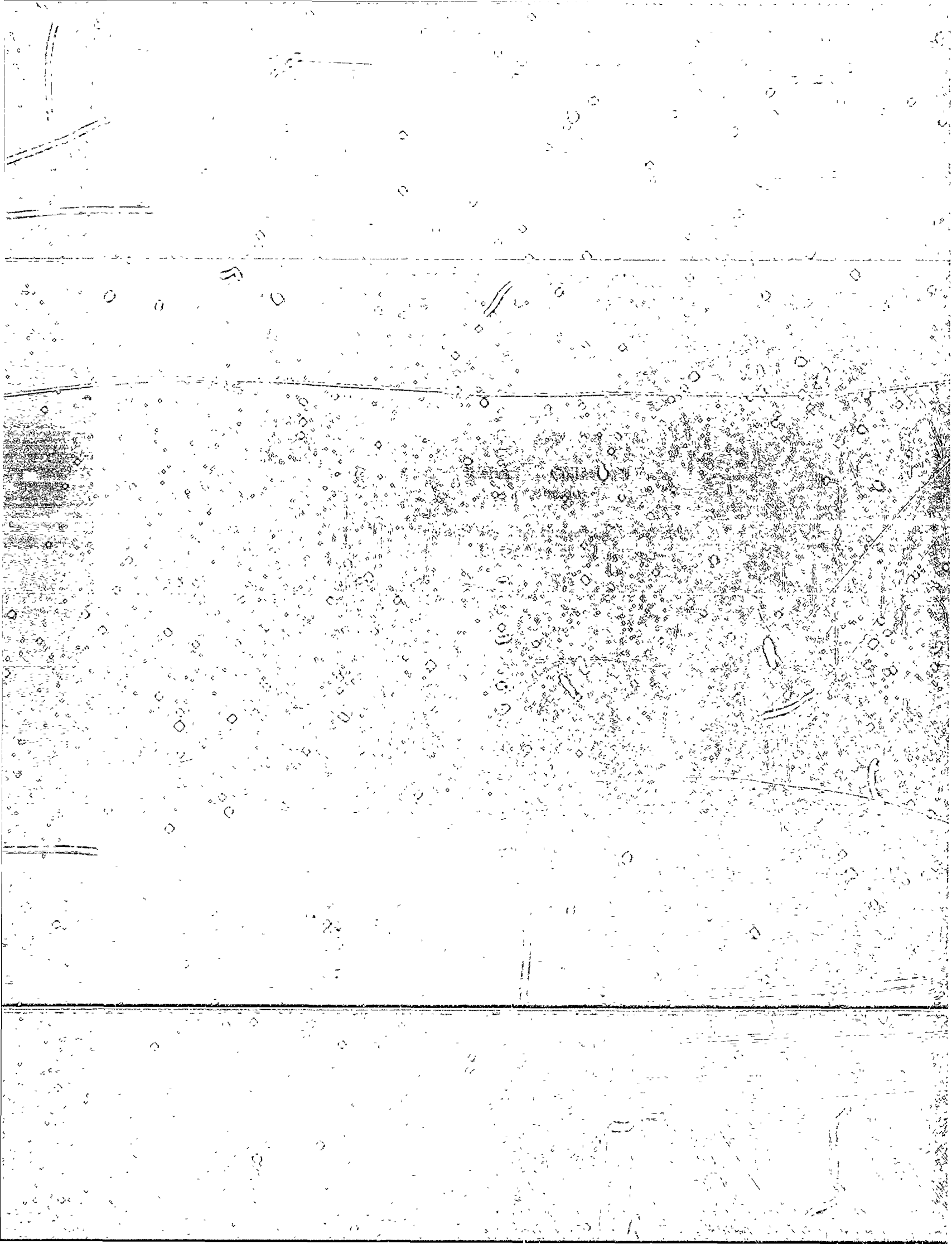
The Corps staff were also satisfied. They were a bit disappointed, however, in their dealings with Goodyear. They had hoped for a more cooperative relationship. The

Goodyear people, with the exception of Hehir, were adversarial and therefore the negotiations at the staff level were harsh.

The neutral, Rich Collins, also got high marks from all of the participants. They felt his questioning during the proceedings was rigorous and on target, his facilitation of the sessions was handled with appropriate authority, and his critical thinking in the private sessions with the principals invaluable in helping them break through the stalemate and reach a decision.

The participants drew several very important and interesting lessons from this case:

- The time commitment of the principals is significant. While a mini-trial procedure can be useful in many kinds of cases, it should be employed selectively in situations in which executive time is truly limited.
- It is critical that the principals have the authority and the capability of making decisions on behalf of their group.
- The principals should meet beforehand and assess whether or not each feels he can "do business" with the other. This includes an assessment of each person's commitment to settle.
- The business and technical people should retain control of these decision processes and not hand them over to attorneys.
- Both principals should feel comfortable with the neutral, both personally and procedurally. The neutral should take direction from the principals and exercise control only to the extent that they allow.
- A neutral with technical expertise is invaluable, if he/she does not overstep boundaries and offer opinions that are not requested.
- This kind of process provides great insight into one's own organization; how the groups present their cases indicates how they organize information and deal with problems.
- The structure of the ADR procedure is very important. The more that can be ironed out at this stage, the better.
- Even with compressed deadlines, there are savings in money and time over litigation.
- The most important ingredient is the supportiveness of the principals and their willingness to settle. This sets a tone that permeates the proceedings and can overcome adversarial relations between the presenters and staff. If the principals don't have the will to settle, or don't communicate it to their staff, the process can unravel.
- Mini-trials are most appropriate for cases which:
  - have a high potential for settlement, or for which the Corps is not convinced it has a strong case;
  - would have a high cost if they went to trial;
  - have multiple claims;
  - have difficult factual, rather than legal issues.



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## **GOODYEAR TIRE AND RUBBER COMPANY: NEUTRAL ADVISOR ANALYSIS**

A mini-trial is a structured dispute resolution process with a catchy if somewhat misleading name. The U.S. Army Corps of Engineers defines a mini-trial as:

a voluntary, expedited, and nonjudicial procedure whereby top management officials for each party meet to resolve disputes.

In a mini-trial, top management officials are brought together for a brief, intense process during which the parties give presentations of their best case to the officials. These top management officials after hearing the presentations attempt to negotiate a settlement.

A key characteristic of a mini-trial is that the top management officials possess on the spot authority to make decisions based on their assessment of the respective cases and their negotiations. Another key element is that the presentations are directed to the top management officials and not to a third party with authority to independently recommend or render a decision on the merits.

Although a neutral advisor may be--and often is--involved in a mini-trial, the advisor's role is defined by the parties and is generally directed to assisting the top management officials to get a useful, understandable, and expeditious body of information. Later, the neutral might be asked to assist in the negotiations among the top management officials.

While mini-trials can vary in format and are tailored to meet the needs of a particular situation, they share certain common characteristics. They all offer parties the opportunity to avoid litigation and replace it with an informal, confidential, less expensive process in which they can control the agenda through mutual agreement.

This case illustrates the use of a mini-trial by the U.S. Army Corps of Engineers and the Goodyear Tire and Rubber Corporation to resolve a Superfund cost allocation issue. The Army Corps of engineers served as a representative of the Department of Defense and the Department of the Navy which was designated, along with Goodyear, as a "potentially responsible party" (PRP) on a Superfund site near Phoenix, Arizona. This site involved two properties adjacent to each other. One property was owned and operated for a relevant period of time by the U.S. Navy. The other was owned by Goodyear which worked closely with the U.S. Navy on aircraft stationed at the Navy base during a relevant period of time.

A PRP is the term which is used by EPA to describe a party who has some association with the site and hence has some potential legal responsibility for cleaning up

the site. The adverb "potentially" may be misleading to the layman. In reality, to be designated "potentially responsible" is to be caught in a net that is very difficult to escape. Thus, "potentially" responsible understates the full impact of being designated as such.

The legal complexities of the Superfund law and the management of those legal aspects by the EPA can powerfully affect the urgency to resolve a dispute between potentially responsible parties. It is appropriate, therefore, to describe the context in terms of the Superfund issue before advancing to a discussion of the mini-trial itself.

### **Alternatives to a Negotiated Agreement in the Superfund Context**

Alternative Dispute Resolution processes, including the mini-trial, are an option available to parties in dispute. These options are mainly directed to avoiding the costs and uncertainties associated with a court suit. The mini-trial is an option weighed against the other alternatives to resolve the dispute. A mini-trial may be an attractive option to parties in many different kinds of disputes; in superfund cases like the Litchfield case described here, the mini-trial may be a dramatically more attractive option than in other types of cases.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) is an unusual environmental law. It allows for a direct action program to clean up a contaminated site if the parties responsible for it are unidentifiable, or if identified are unable, or unwilling to accept responsibility for the remediation. There can be, as there was in this instance, financial, legal and management advantages for potentially responsible parties to agree on their respective share of the financial responsibility for remediating a site. If the parties can agree to their respective shares of responsibility they can present a third party--the U.S. Environmental Protection Agency--with a cleanup plan that they can pay for with their own funds and manage directly.

The advantages the parties gain by an agreement include a less costly cleanup process, and the removal of the threat of legal action by the EPA if they fail individually or jointly to undertake the required cleanup.

The Superfund law imposes strict, joint and several liability on parties who are identified as potentially responsible parties. This means that there is no defense from the liability on the grounds that the party did not act negligently. Also, a single party may be held responsible for all of the cleanup even if their individual contribution to the contamination was fractional.

There are many good reasons to undertake an ADR or specifically a mini-trial to resolve disputes. Many of these reasons have to do with joint gains to the parties by a more timely and less expensive and acrimonious resolution of an issue. But in this case, the motivation to undertake a mini-trial was increased by the presence of a third party--the EPA--which has the power to adversely impact the parties in the absence of an agreement between them.

The Superfund law is quite vague about what legal standards should govern the allocation of financial responsibility for cleanup costs among different parties. Generally, it is assumed that such things as toxicity, volume, leachability, and other factors related to the risks created by identifiable parties are relevant, but there is very little settled case law. The EPA has generally taken the position that the various parties should handle the question of how to allocate the related costs among themselves. The EPA is not eager to try and determine what shares are appropriate as long as they can find a way to remediate and recover costs from at least one party.

The PGA/Litchfield site is typical in that the alleged contamination occurred thirty or forty years before the Superfund law was passed. Thus, at the time the contamination may have occurred, the parties were not necessarily aware of the risk to the environment or public health associated with the materials or practices employed at the time.

Given these conditions and uncertainties, potentially responsible parties have an incentive to work out their cost allocations. In ADR terms the best alternatives to a negotiated agreement (BATNA) are decidedly unattractive. An agreement on cost allocation between the Corps and Goodyear would mean that both parties might cooperate in cleaning up the site with the potential for large savings over what an EPA contracted cleanup might eventually cost them.

Additionally, and perhaps even more importantly, an agreement with EPA removes the cloud of uncertainty surrounding EPA's legal options and the uncertainty, expense, and publicity of an EPA action.

In the absence of an agreement between the parties the EPA could sue parties for the full costs related to the investigation, studies and remediation. Or, it could sue just one party for the entire cost and leave that party to sue the other party for their share. It could even assert that one or both parties should pay treble damages for failing to comply with EPA's orders. Obviously these alternatives are unattractive to the potentially responsible parties.

A mini-trial involving a cost allocation of a Superfund cleanup makes the EPA position critical to the BATNA of the parties. The policies of the EPA, the role of their regional officials, and various "forums" within the agency can influence the parties eagerness to agree on their respective shares of a cleanup.

Another uncertainty associated with a Superfund cleanup is the type of cleanup that will be required and the cost associated with it. If, as in this case, the EPA recommends pumping water out of the ground, removing the offending chemicals and then reinjecting it, the duration and cost of the cleanup is unknown.

A final factor that shapes the parties' attitudes toward a negotiated settlement is the potential public reaction to an EPA action. Understandably, Superfund sites are subjects of intense local and even national, interest. There is always the fear among potentially responsible parties that attention directed to a Superfund site for any reason may bring an unwelcome comparison with public images of Love Canal or the Valley of the Drums.

This publicity, although unwelcome by all parties, may concern a private firm with a brand name product more than a government agency. Such a firm is extremely sensitive to its public image and to the effects a negative image might have on its market position.

Thus, in Superfund cases it appears that potentially responsible parties can have a strong mutual interest in a cost allocation agreement because of the uncertainty and potential consequences created by an impasse. The likelihood of the parties achieving substantial gains through litigation with the EPA or between themselves are remote and unlikely. The lack of an attractive BATNA for the parties adds strength to the other forces that discourage litigation and encourage a negotiated settlement.

This is the context which the parties involved in the PGA/Litchfield Superfund site faced as they evaluated the use of the mini-trial option. It will be important to keep this context in mind as we review the chronology of the case and decisions to go to a mini-trial.

### **Chronology of the PGA/Litchfield Conflict and Mini-trial**

It will be useful to begin the discussion of the PGA/Litchfield case with a chronology beginning with the discovery of the contamination at the site through the conclusion of the mini-trial. While it will remove any suspense that might otherwise be there regarding the outcome of the case, it provides the reader with a better framework for understanding the narrative.

1981: Solvents, principally trichloroethylene (TCE), were discovered in the groundwater and soils at the PGA/Litchfield site by the Goodyear Corporation and the Arizona Department of Health Services. TCE is considered a "potential human carcinogen." EPA initiated investigation of the site under its Superfund authorization.

1983: The EPA investigation process led to the PGA/Litchfield site being placed on the Superfund National Priority List. This listing signifies that the site has a high risk evaluation in a comparison with sites throughout the U.S. This list is public and it assures that a site listed will be given priority for cleanup under the Superfund law.

1983-1987: EPA undertook a Remedial Investigation and Feasibility Study (RI/FS) for the site. The Department of Defense (DOD) and the Goodyear Corporation were identified as the "Potentially Responsible Parties" (PRP's). The fact that these were the only major potentially responsible parties is significant, since many Superfund sites have many more potentially responsible parties.

September 1987: A Record of Decision and a Special Notice Letter were sent by EPA to the Department of Defense and the Goodyear Corporation. The EPA then gave the parties 90 days to make a "good faith offer" which according to EPA includes: a statement of the parties' willingness to conduct or finance the remedial action; a demonstration of technical and/or financial capability to do this; and a schedule for completing the remedial action. If

the good faith offer is accepted, a consent agreement may be reached which, in effect, allows the parties to conduct the cleanup on agreed terms and under court supervision.

September 1987-February 1988: Goodyear and the Department of Defense (represented by the Corps) engaged in negotiations to try and develop a cost allocation agreement based on their assessment of their respective shares of responsibility for the contamination of the site. These negotiations were unsuccessful. When the negotiations broke down, Goodyear pursued the possibility of making a good faith offer to EPA on their own without an agreement with DOD on their respective shares of the total cost.

January and February, 1988: Goodyear had second thoughts about proceeding independently with the good faith offer which might conclude with the signing of a consent agreement. The Corps, which did not participate in the Goodyear good faith offer, attended sessions between EPA and Goodyear. The Corps wanted to avoid litigation with either Goodyear or the EPA.

February 1988: The time given the parties by EPA to sign a consent agreement expired. At this point, the EPA had a number of options available. Those options included a lawsuit against the parties and the potential for penalties up to three times the cost of the cleanup. If Goodyear and the Corps could not agree on an apportionment, they would also eventually have to go to court for a determination of their respective shares of financial responsibility.

January-March 1988: The parties began to discuss ADR options and finally agreed to a mini-trial. EPA reluctantly agreed to extend the consent agreement deadline until May 25 based on this last effort to try to resolve their differences.

March-May 1988: An agreement was reached between the parties to undertake a mini-trial. Preparation for the mini-trial included negotiations on the "rules of the game" or mini-trial agreement.

May 1988: The mini-trial took place on May 19 and 20. While the mini-trial was being conducted, parallel negotiations were also taking place to define the base of costs to which any mini-trial apportionment would apply. On May 21 a cost allocation agreement was reached by the parties providing a successful conclusion to the mini-trial.

Let us now turn our attention to examining in greater detail the various stages in the process that led up to the mini-trial, its design, and outcome.

### **Getting to the Table**

We have seen that in this case the potentially responsible parties have a strong motivation to achieve a satisfactory agreement on their relative share of the cleanup costs. This is not to say that both parties are equally vulnerable or perceive the risks identically.

Goodyear was more apprehensive than the Department of defense about the range of possible consequences that they might suffer if an agreement on the respective shares was

not reached. Goodyear thought whatever contamination they might have been responsible for was the result of wartime exigencies and was consistent with accepted practices at the time of the contamination. They did not want public attention focussed on the site to stimulate public reaction which might lump what they considered to be a manageable situation with the likes of a Rocky Mountain Arsenal, Times Beach, or Love Canal.

Goodyear also feared that since the EPA and the Corps of Engineers were both federal government agencies with a number of important program relationships, they might form a coalition against Goodyear. The Corps sometimes serves as a contractor with the EPA on investigations, feasibility studies and remedial actions. The Corps and EPA also have joint responsibilities for issuing permits for wetland alteration. Goodyear thought that these relationships might influence EPA attitudes toward the respective financial shares of Goodyear and the Corps. Additionally, it was not clear that EPA's Superfund authority over DOD was as complete as over Goodyear.

The EPA "historical" 50/50 allocation of responsibility for cleanup costs was more satisfactory to the Goodyear Corporation than it was to the Department of Defense. DOD did not believe that the Navy's contribution to the problem was by any means equal to Goodyear's. And, although the negotiations between the two parties to achieve a more satisfactory allocation ultimately broke down, it appears that neither party believed that the chance for some form of negotiated settlement had been irreversibly lost.

Neither side, however, was satisfied or prepared to move to litigation. First, although there was a chance that a court might require DOD to pay at least as much as 50% of the cost there was also a chance that their share might be much less. Neither party's attorneys recommended litigation. They were skeptical of the cost and time involved as well as the fact that there was very little judicial precedent that governed cost allocation shares under Superfund.

EPA could settle with one party and proceed against the other party in court if no agreement on their respective shares of the cost could be agreed upon. But, the incentives for one party to try and settle with EPA depend upon the actions EPA might take against the other party not included within the settlement. The incentives also are affected by the fact that if one party assumes the cost of the entire cleanup and then has to recover the share from the other party, it may be a difficult and expensive process.

Neither the Corps nor the Goodyear Corporation were optimistic about a litigated resolution of their respective shares. In addition to the legal uncertainties involved, once there was a court suit the Department of Justice became, in effect, the Corps lawyer. This additional party would make any negotiation thereafter even more complicated. It seems that there was a sufficient belief that a negotiated resolution could be achieved to deter either from instituting a suit against the other.

Even with all of these factors pointing strongly in the direction of a negotiated settlement of shares between the two parties, it does not appear that the "clients"--DOD and Goodyear--were as enthusiastic about the potential of a mini-trial as were the Corps of

Engineers and the Multinational Legal Services which served as an advisor to the Goodyear Company.

The Corps of Engineers has established a reputation as a federal agency with a strong commitment to alternative dispute resolution (ADR). It has successfully used various forms of ADR including mediation, arbitration, and mini-trials to deal with contract disputes, procurement, and wetland permits and mitigation measures. It also has a decentralized administrative capability, senior staff familiar with and sympathetic toward ADR as a cost effective management tool, and experienced and effective negotiators within the organization.

The Corps had assigned its Omaha District, one of the designated design centers for hazardous waste management activities in the Corps, as its representative for the negotiations. Thus, the Omaha office had a staff that was familiar with Superfund law, hazardous waste issues, groundwater geology and EPA processes. Colonel Steven West, District Engineer for the Omaha District, was a tested negotiator and manager with ADR experience. He had advocated and served as a senior official in a mini-trial between the Corps and the Bechtel Corporation which had successfully concluded with a settlement involving \$3.7 million.

While the Corps was familiar with and basically favorable to ADR approaches, a mini-trial would place a greater burden on the Corps and Colonel West than on Goodyear. Tensions are created within organizations when they seek to negotiate with outside parties. A mini-trial is enough like a lawsuit that it includes elements of adversarialism, making the best case for your side, and creating a competitive climate with a consequent "win-lose" attitude.

In this case the senior management official for the Corps of Engineers, Colonel West, was also the supervisor for the lawyers and technical staff who had the responsibility of developing the best and executing the preparations for the mini-trial. The senior manager is responsible for motivating and supporting the adversarial aspects of the mini-trial, while at the same time trying to create a climate for mutual trust and possible accommodation. There is a potential here for the staff to become convinced of the rightness of their position even as their supervisor must try to prepare them for possible compromises.

It appears that in the selection of the senior management official for the Corps of Engineers there was some question whether it should be a Washington based or an Omaha based executive. Ultimately, the Omaha office was chosen. As these decisions were being made there was also discussion within the Corps about the potential range of acceptable settlements and possible outcomes. By the time of the mini-trial it appears that there was sufficient agreement within the Corps to allow for a flexible settlement position.

The amount of work that needs to be done to prepare for a mini-trial can be formidable. The staff of the Omaha office of the Corps of Engineers sometimes felt that they were on a tight schedule and were in a short staffing position. However, they were able to prepare their case. They also were able to get contractor assistance from consultants to help review and integrate their technical data.

Although there were problems for the Goodyear side in preparing their case, it appears that the potential for organizational difficulties may be greater on the government side. This stems in part from the fact that the relationships within the Corps are closer and continuous where Goodyear's relations with the preparers of their case were contracted to others.

Goodyear Corporation had retained Multinational Legal Services, Inc. for assistance with its problems at the Superfund site and to assist in obtaining a cost allocation agreement. The MLS Director, Mr. James Tozzi, had a reputation for skillful intervention in regulatory disputes of all kinds. The firm's professional notices to clients emphasize that MLS provides "assistance in all ADR services, with emphasis on federal matters such as government contract disputes, regulatory matters, and Superfund site issues, as well as litigation management where litigation becomes unavoidable."

Mr. Tozzi has been employed by the Corps of Engineers, the Department of Defense, and the U.S. Office of Management and Budget in the Executive Office of the President. Between 1964-1972, he had served in the Office of the Secretary of the Army and was responsible for budget preparation and congressional liaison for the Corps of Engineers. Later he served as Assistant Director of the Office of Management and Budget and was responsible for reviewing federal environmental programs. From 1973-1983 he served as Deputy Administrator of the Office of Management and Budget. In this last position he had supervised the review of proposed regulations emanating from federal agencies.

this case is not one where the client seems to have had a cooler head than the lawyers who are battling each other without a full consideration of broader consequences. Rather, it appears that the reverse was true. It appears that Goodyear executives and lawyers had to be persuaded that the circumstances just did not favor an adversarial or litigative approach.

The Chief Counsel of the Army Corps of Engineers, Lester Edelman, had been one of the foremost advocates of ADR in government circles for some time. He encouraged the Corps District and Division, the Department of Defense, EPA, the Department of Justice, and Goodyear (through Mr. Tozzi at MLS) to try to use a mini-trial to resolve the case. Mr. Edelman felt strongly that the best and most effective way of resolving this issue was through a mini-trial. Mr. Edelman and Mr. Jack Mahon, Senior Counsel for Environmental Restoration and a major actor in environmental matters including Superfund cleanups, continued to nudge the parties toward ADR. Mr. Edelman insisted, however, that if a mini-trial was arranged, the parties at the table had to have the authority to resolve the matters without the need for additional approvals. This proved to be significant in the ultimate success of the mini-trial.

It appears fair to say that both parties were unusual in the extent of their knowledge of ADR and the advocacy of that approach by influential persons within both camps. Even at that, there might not have been a mini-trial except for the particular features of the Superfund law. Although other ADR options were considered, such as employing a



mediate and resuming negotiations or using an arbitration of some type, it appears that the mini-trial came to be the preferred alternative very quickly.

### **The Structured Dispute Resolution Agreement Between the U.S. Army Corps of Engineers and the Goodyear Tire & Rubber Company.**

A mini-trial is governed by a structured dispute resolution agreement that is worked out by the respective parties. In effect, the mini-trial is preceded by a negotiation on what the rules of the game will be. The mini-trial agreement was worked out between the Corps, MLS, and their respective clients. Discussions on the terms of the mini-trial agreement were led by Gary Henningson, an attorney for the Corps Omaha district office, and Judge David Schwartz of MLS. The terms of the agreement included the following:

1. The Management Representatives participating would have full authority to settle the dispute.
2. The Management Representatives were to be Colonel Steven West of the U.S. Army Corps of Engineers and Dr. Robert Hehir, a Vice-President for Government, Environmental Safety and Health Assurance Programs, Goodyear Corporation.
3. The mini-trial would be a nonbinding hearing process designed to inform the Management Representatives of the position of the respective parties on the dispute and the underlying bases of their positions.
4. The scope of the hearing was confined to the particular site that was at controversy. This site was called an "operating unit" by the EPA in their Record of Decision. This left open the possibility that other "operating units" might have different levels of responsibility.
5. The date, time limits, and location of the hearing were agreed upon and each party agreed to exert their best efforts to reach a settlement before June 1. If no agreement was reached by that time, the ADR would be ended.
6. The agreement specified that a "sidebar" agreement between the two parties would be developed to determine what specific costs were to be covered by an agreement on allocation percentages. (A sidebar agreement is one that is connected to the mini-trial agreement but negotiated separately from the mini-trial subject).
7. A neutral advisor would be appointed and mutually agreed upon by April 1, 1988.
8. Limitations were set on the use of discovery, and parties agreed to assist each other in interviewing and deposing witnesses. Each party agreed to take depositions of no more than 5 individuals for a maximum of 20 hours.
9. Each side would choose a presenter. The presenters selected were Gary Henningson, the attorney for the Corps Omaha District Office and Henry Diamond of Washington, D.C. law firm of Beveridge and Diamond.

10. The rules of evidence would not apply and informality would be the rule.
11. Time limits and schedules for presentation were agreed upon.
12. Each side agreed to provide a "statement of contention" or position paper of not more than 25 pages.
13. There would be no transcript or recording made of the hearing, and all material was protected as if it was to be a part of a settlement conference in any court, State or Federal.

### **Execution of the Mini-trial Agreement**

The preparations for the mini-trial even after the mini-trial agreement was reached were extensive, sensitive, and somewhat tense. The collection of depositions, the discovery process, and the utilization of these materials in the mini-trial created some mutual dissatisfaction between the parties. Mr. Diamond was not retained until the mini-trial was agreed upon. As a trial lawyer with a reputation as a talented and experienced advocate he may have had some difficulty adjusting to the premises of at least some of the ADR advocates within the Corps and MLS.

Reading the transcripts of the depositions taken jointly by Mr. Diamond and Mr. Henningson gives some sense of the problems faced by the attorneys in determining how adversarial their stance should be. Mr. Henningson later noted that he felt the Corps staff were being pressured by Goodyear to undertake travel and provide information beyond what was agreed upon. He also noted that some of the testimony taken from the depositions was employed in the mini-trial in a way that he felt belied the context. This period between the agreement on the mini-trial process and the execution of the tasks necessary to meet the agreed upon deadline is obviously critical to creating the climate for the mini-trial. Mr. Diamond's approach was more consistent with the presentation to be made before a judge and jury than was Mr. Henningson's.

### **The Neutral Advisor**

At an early point the parties agreed that a neutral advisor should be employed to assist in the mini-trial. David Schwartz, a retired Claims Court judge who worked for MLS, had the principle responsibility for developing a roster of qualified candidates, negotiating costs and encouraging joint approval from the two parties and their senior officials.

Judge Schwartz sought qualified neutrals from organizations such as the Center for Public Resources which is a leader in promoting mini-trials in corporate disputes and which maintained a roster of qualified neutrals. He also sought recommendations from groups like the American Arbitration Association, and from groups with knowledge of mediators generally experienced in the field of hazardous and toxic waste issues such as Clean Sites, Inc.

The parties initially sought a neutral who might be a retired judge. They also felt it would be valuable if the neutral had knowledge of the scientific and technical aspects that would be considered in the presentations. Thus, someone with familiarity with groundwater hydrology, toxic wastes, or chemical processes would be helpful in assisting the senior officials define and target the key elements in the expected presentations.

Finally, they concluded that the two senior management officials were confident negotiators, quite conversant with the substantive issues, and would have ample legal and scientific support available. They would therefore try to choose a person who might be more of a facilitator-mediator. Such a neutral would be less a scientific authority or experienced arbitrator than one who would be responsive to the negotiating needs of the management officials. They decided to select a non-lawyer whose experience was primarily in mediation and who would be oriented toward assisting others in the process of negotiations.

Dr. Richard Collins, Director of the Institute for Environmental Negotiation at the University of Virginia was finally approved by both parties. The choice of Professor Collins as the neutral advisory was discussed in the Chief Counsel's office. His use as third party was approved by Mr. Edelman after consultation with Dr. Jerome Delli Priscoli, Senior Policy Analyst with the Corps Institute for Water Resources, who was familiar with Collins' work in environmental mediation at the University of Virginia.

Dr. Collins had extensive experience as a mediator in environmental and land use issues, had served as a facilitator of a Toxics Roundtable in Virginia composed of environmental and industry representatives which had drafted a bill which became the basis for an enactment of a state waste facility siting law. He had also served as a member of an arbitration panel on a cost allocation dispute under the auspices of Clean Sites, Inc., regarding a Superfund site in the Midwest.

The parties agreed to share the costs of Collins' services and expenses. There was little difficulty in the procurement or financial side of the appointment because the costs were under \$10,000, the amount that would have required the Corps to go to a competitive bid for services.

The mini-trial agreement specified a number of conditions regarding the role of the neutral in the mini-trial. For example, the neutral was barred from any "ex parte" contact or communications with either party or its presenters. The parties agreed to provide the neutral with copies of all hearing materials exchanged by the parties except material gained through discovery that was not to be used at the mini-trial. The neutral was authorized to "ask questions of witnesses and presenters, unless the principal participants otherwise requested." Finally, the neutral was, upon request by either principal, to "provide comments as to the strengths and weaknesses of any evidence or argument of a party's position."

The neutral had no contact with any of the parties beyond the telephone discussions regarding his selection until the meeting commenced in Phoenix. The position papers and

material arrived three days before the Phoenix meeting, which was the first real introduction to the particulars of the dispute for the neutral.

The precise role of the neutral was worked out in face-to-face meetings with the senior officials after they arrived in Phoenix. The two senior management officials and the neutral met early the first morning to introduce themselves and to discuss their mutual expectations. Both Dr. Hehir and Colonel West agreed to have Dr. Collins assume an active presiding role. They felt that with Dr. Collins rather than themselves taking an active interventionist role, they would not create impressions within either team that would appear to be too aggressive or partial. They indicated that if they had specific questions or comments they would feel free to intervene. Finally, they made clear that they would give "feedback" to Dr. Collins on whether the movement and timing of the mini-trial and the questioning or commentary by Dr. Collins was meeting their mutual needs.

### **The Mini-trial: Substance and Process**

Assuming that the evidence and testimony presented at the mini-trial would be representative of the evidence and testimony that would have been used in litigation to determine the relative responsibilities of the parties for the groundwater and soil contamination at the site, the crucial issue was the quantity of trichloroethylene (TCE) used by the respective parties, at what time, and at what locations. Both parties understood in advance that this would be a key issue in the mini-trial. The basic timetable for the presentations is presented below:

#### Day 1

8:30 a.m. - 12:00 Noon	Goodyear's position and case presentation
12:00 Noon - 1:30 p.m.	Lunch
1:30 p.m. - 2:30 p.m.	Corps response
2:30 p.m. - 4:00 p.m.	Goodyear's response
4:00 p.m. - 5:00 p.m.	Open question and answer period

#### Day 2

8:30 a.m. - 12:00 Noon	Corps position & case presentation
12:00 Noon - 1:30 p.m.	Lunch
1:30 p.m. - 2:30 p.m.	Goodyear's response
2:30 p.m. - 4:00 p.m.	Corps response
4:00 p.m. - 5:00 p.m.	Open question and answer period

#### Day 3

9:00 a.m. - 10:00 a.m.	Closing arguments, of 1/2 hour each, Goodyear first, followed by Corps. Thereafter the principal participants and neutral advisor meet to negotiate a settlement.
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The room was set up so that the two presenters and their staffs were on opposite sides of the room. The senior management officials and the neutral sat together at a table between them. The front of the room was set up so that exhibits or visual presentations

could be displayed. Witnesses were able to also assume a seated position in the front center of the room.

**Goodyear Presentation:** The Goodyear Corporation through their presenter, Henry Diamond of the Washington, D.C. law firm of Beveridge and Diamond, presented the major "theme" of their case: DOD should pay substantially all costs involved in the cleanup because the Navy had caused most of the contamination. Where Goodyear may have contributed to the problem they were working closely with the Navy in an effort to meet national defense needs and in response to Navy operational and material specifications and to Navy supervision of their use. Thus, any contamination that might have resulted from their actions was a Navy responsibility.

Key elements of Goodyear's presentation involved the testimony of individuals who had been present during WWII and post-WWII who described the practices on the Navy property and the relationships between the Navy and Goodyear in working together with Navy aircraft that went back and forth on each other's property.

Assuming that the quantity of material used by the two parties would be an important fact in any determination of financial responsibility, Goodyear's case hinged on establishing the use of TCE by the Navy. Through records and testimony of individuals who had been associated with the Navy's work a case was made that some quantities of TCE had been employed by the Navy and could have found their way into the soil and groundwater through the practices employed by the Navy in degreasing aircraft.

But a critical element of the Goodyear presentation was the explanation for the patterns of TCE concentrations displayed on site maps. The Goodyear experts presented an explanation for the observed data by the use of a model employing hydrogeological assumptions which related to groundwater movement and dispersion rates through time. The model involved some rather technical aspects that were challenged by the Corps witnesses in their testimony.

**Corps Presentation.** The Corps of Engineers case as presented by Mr. Henningson emphasized that the Corps saw themselves more as a disinterested analyst than a partisan advocate for their client. Henningson was representing the DOD but was trying to establish the Corps role in Superfund cases involving Department of Defense agencies as expert and balanced. The Corps wished to be seen by other parties--presumably including EPA--as an independent source of expertise. Thus, the Corps was placed in a position in which it was protecting and serving its role as an impartial, scientifically based resource consultant as well as an advocate for the U.S. Navy and the Department of Defense.

Although these roles do not necessarily conflict, their combination creates an internal tension which complicates the approach to the mini-trial.

Colonel West, in his private discussions with Mr. Hehir also emphasized the Corps role as being a scientific expert resource. But he also indicated that his staff felt very strongly that the facts supported the position that the Navy was only a minimal contributor to the TCE problem.

The Corps case emphasized the ownership and use patterns of the Goodyear Company to establish that the contamination had actually occurred while the property was owned and operated by Goodyear and largely used for manufacturing activity separate from relationships with the Litchfield facility or with government contracts related to Litchfield. Secondly, the testimony of their witnesses, which included Corps professionals as well as an outside groundwater consultant, attempted to show the volumes of TCE used by Goodyear were very great and were stored, used, and possibly spilled or disposed of at sites that were adjacent to a storm drain that ran from their property across the Litchfield property.

Their theory was that large volumes of TCE were used by Goodyear in the time period that would have been critical for the patterns of movement of the TCE to the locations where it was now found in troubling concentrations. Their experts explained and rationalized the investigative data based on the characteristics of TCE (volatility for example), the characteristics of various kinds of tests that had been employed (including soil surveys and measurements of TCE in gaseous state within the soils), and the groundwater gradients that would cause the TCE to move from the Goodyear site to the Navy site.

Perhaps the critical event in terms of the perceptions of the two senior management officials was when Colonel West suggested to Dr. Hehir that with Dr. Collins they visit the site and consider the data presented by the two sides "on the ground." Dr. Hehir agreed this would be a good idea and arrangements were made to visit the Goodyear and Litchfield sites. It was Collins' impression that the location of the vapor degreasing units on the Goodyear site, the proximity of those degreasers to the storage tanks and to the storm sewer which extended from the Goodyear to the Litchfield site, were influential in the conclusions reached by both Colonel West and Dr. Hehir.

### **The Role of the Neutral**

Much of the information presented in this case was not known to the writer prior to, or during, the trial. It was gathered later by the same process that any investigator might have employed--reading, interviews with various parties, and some reflection.

In the Litchfield case the neutral was not involved with the preparation of the mini-trial agreement. The agreement had been shaped before the appointment of the neutral. The locations, dates, procedures, rules, and understandings were between the parties.

The logistic and administrative aspects such as allocation of time, types of presentations, agreements on number of presenters were also agreed upon by the parties with no involvement of the neutral.

Additionally, the facts and legal issues that were to be considered and judged were also decided upon by the parties. The neutral was given a bare-bones description of the facts surrounding the Litchfield site, but it was only three days before the Phoenix meeting that the rules of the game and the presentation material arrived for the neutral's review.

One of the questions which has been in this writer's mind in preparing and writing this study is whether the neutral could have usefully been involved at an earlier point. Would it have been beneficial to the parties to have someone assist them in discussing the process and format? Would this have added an additional burden to the already formidable problems of negotiating an agreement? Or, might such an earlier involvement by a disinterested neutral have assisted in creating the climate desired at the proceeding itself?

Within the mini-trial concept there is an internal tension; is it more like a trial or more like a mediated negotiation? Obviously, it combines elements of both. But, preparations for a mini-trial negotiation are different than preparations for a trial.

The staffs required to prepare the presentations for the trial have responsibilities and pressures that are quite different from those of the senior management officials. The presenters need to prepare a strong case and to present it vigorously.

In the development of their case they may legitimately feel that they are being disadvantaged by the other side. Trial-like needs by the presenters may conflict with the relationship needs of the senior officials. Such a conflict seems inherent in the hybrid model that the mini-trial represents. It required a delicate balancing act to come to the Litchfield mini-trial with both a strong case and the climate necessary for sharing information and maintaining mutual trust.

Similarly, the mini-trial hybrid creates role pressure on the neutral. A mediator employs processes and behavior that can be quite different than that expected of an arbitrator or even a presiding officer. The mini-trial requires some balance of different roles. They are not necessarily mutually reinforcing.

When the neutral is an arbitrator, he is expected to remain independent and somewhat distant from the parties. The adjudicatory role imposes a certain expected sense of propriety and formality that is different from that expected of a mediator.

The mini-trial puts responsibility on the neutral to establish a role not only consistent with the written mini-trial agreement, but also with the senior management officials who are the focus of the presentation and who are also interested parties with negotiating stances.

The selection of the neutral both in professional background and in personal qualities can be important. It appears in this case that the major responsibility for identifying and encouraging a selection of the neutral was done by Judge Schwartz of Multinational Legal Services. The Corps did not have a separate roster, nor apparently were there extensive discussions about whether the neutral should be a person with a stronger background in law, technical expertise, or mediation processes.

The Corps and the Goodyear Corporation had somewhat different attitudes about how the mini-trial should work. The impression was that the Goodyear approach was more nearly trial-like while the Corps approach was based on a model of mutual fact finding and prepared presentations.

Where such conceptual differences exist, there is the potential for conflict in the mini-trial. The parties who actually negotiated the mini-trial agreement may have had understandings about how a particular block of time described as "rebuttal" was supposed to be used. The senior managers may not have been aware of those understandings. It is quite plausible, in fact, that differences among the parties as they negotiate the mini-trial agreement may not be brought to the attention of the senior managers.

A good trial attorney might feel that his talents, skills, and approach are the appropriate ones to be employed. When these approaches--for example, cross-examination--are limited, denied, or supplanted, an attorney might feel aggrieved and constrained.

In this mini-trial there was only one instance in which the parties got into a bit of a disagreement on the "process." One side felt that the other was introducing new material in a time period when the mini-trial agreement--as they understood it--was to be confined to material already introduced. The issue was resolved by the neutral listening to the parties explain their views and making a decision that seemed to be in the spirit of the informal approach endorsed by the senior managers.

Mr. Diamond, during his cross-examination of an expert witness in hydrology, attempted to discredit the data and theory he had presented earlier. The neutral suggested that this approach did not seem to offer hope for illuminating the differences between the Corps witness and the Goodyear witness. He suggested that rather than using the cross-examination process, a colloquy between the two experts might work better. This discussion between the experts had some advantages for the lay person. However, Mr. Diamond was clearly frustrated by this. One of the geologists posed a question of Mr. Diamond and he replied, "I'm willing to go along with this informality but I draw the line at the witness cross-examining me." That got the biggest laugh of the mini-trial. But there was a serious point, too. Mr. Diamond felt that if he could have conducted a careful cross-examination he would have been able to discredit the conclusions of the Corps witness. He felt that the rules worked against his strengths.

How much authority should the neutral have to decide procedural questions that will arise? In this case the senior managers had, in effect, supplemented the formal mini-trial agreement by informal understandings between themselves and the neutral.

The decision by the senior managers to establish some distance between themselves and their respective teams was both a signal and an opportunity. It indicated their desire to establish a relationship distinct from the partisan presentations. It also gave them the opportunity to join with the neutral and to create, in effect, a cohesive unit.

West, Hehir, and Collins spent considerable time together at meals outside of the hearing during the two days. During that period Colonel West and Dr. Hehir spent time discussing their managerial experiences. Dr. Hehir has been a high official in the Department of Health, Education, and Welfare and he related anecdotes of his management experience both in government and with Goodyear. Colonel West also related accounts of his experience in large military and civil work projects around the world.



Perhaps the social psychologist would have a more incisive and interpretative view of the interplay between the two senior management officials, but from the perspective of the neutral they seemed to genuinely enjoy each other's company and sharing their personal histories and experience. Obviously, they were also learning a good deal about each other's background, approach to resolving problems, and attitudes toward the conduct of the mini-trial. They both emphasized how important an agreement could be to expeditiously cleaning up the site and reducing the threat of further contamination.

These senior managers were anticipating the eventual negotiations, but much of their conversation was peripheral to the mini-trial. They encouraged and directed the neutral to assume a presiding and even interventionist role in the proceedings. This role put upon the neutral the responsibility for anticipating the needs of these officials. The social time together was helpful in assisting the neutral in getting some sense of their approach to the issues and the extent of their knowledge of particular parts of the presentations. For example, if one of the senior management officials had indicated that he had no knowledge of groundwater dynamics, this could affect the way the testimony might have been approached.

To some extent, the neutral by assuming this role is also risking a perception of bias or even a judgmental attitude towards the presentations. It is difficult to maintain an active role without having the presenters or the senior management officials feel that the neutral is exhibiting a point of view.

In this mini-trial, as in many others, there were complicated legal and factual issues. The neutral is expected to identify with the needs of those senior managers while keeping within the agreements forged in the mini-trial agreement.

Finally, the neutral is faced with the potential for questions from the senior managers on the substance of the mini-trial. A person who has been a mediator is more comfortable frequently with not giving an answer to this type of question, but encouraging the parties to answer it themselves.

The mini-trial agreement had stipulated that the neutral could be asked to comment upon the substance of the presentations. The senior management officials did ask Dr. Collins for his view. He offered his assessment based on the apparent quantitative contributions of the parties to the TCE problem. His view was that, based on relative quantitative contributions, the preponderance of the responsibility would fall upon Goodyear.

This opinion did have some influence on the negotiating parties. But, the opinion may also have affected the mediation role. It is not clear what the proper stance to take on this issue should have been given the imprecision of the neutral's role.

## Negotiations and Agreement

The sidebar agreement was principally concerned with establishing the basis of the costs that would be apportioned among the parties in the mini-trial. There were numerous attorneys and other experts in Phoenix who were dealing with that issue. It sometimes seemed that the "sidebar" issue was more complicated and challenging to the two parties than the cost allocation mini-trial. In a number of instances, Dr. Hehir and Colonel West would talk about costs related to the past work done by EPA, the likelihood that EPA would impose more costs on them because of the delay for the mini-trial, etc. For example, EPA had, in agreeing to an extension of time to permit the mini-trial, told the Goodyear attorneys that they were likely to reevaluate the costs associated with EPA work and that additional costs might have to be borne by the parties.

Dr. Hehir, in a couple of situations, decided to have Goodyear assume the risks or the costs associated with sidebar issues. It appeared to Collins that Dr. Hehir's willingness to assume some of those costs helped to build good will with Colonel West as well as keeping the main issue of cost allocation in the forefront.

After the conclusions of the presentations at the mini-trial, Dr. Hehir, Colonel West and Dr. Collins went to a private room where Dr. Hehir and Colonel West discussed their perspectives on the mini-trial presentations.

Both Hehir and West began their discussion by praising the quality and professionalism of their own "team." Colonel West seemed to be particularly impressed with the Corps professionals and their performance. He noted that the general public sometimes underappreciates the quality of federal employees and the public service.

For over two hours the two men talked about how they viewed the presentations and what it meant in terms of the Cost Allocation Agreement. Collins's observations were that the two men seemed to be moving toward a "number" but without actually using any. Dr. Hehir conceded that DOD responsibility for the total cost was probably not warranted. He never said he would have a "bottom line" of say 50% or something on that order; however, it appeared he was the more probing party in terms of seeking a "number."

In any case, it was clear that the two would not be able to make an agreement that evening and finally they suggested that they convene at an early hour the next day. They met with their "teams" during the interim period. The neutral did not attend any meetings of the senior management officials with their respective teams. During the breaks in the mini-trial and during the evenings, there were discussions among, and across teams both on the Cost Allocation Agreement and on the sidebar issues.

Hehir and West talked across a table for extended periods--running into hours. Collins sat at the end of the table. On one occasion Collins was asked to leave the room while the two talked privately. However, for the first evening and morning of negotiations the discussions covered the relative strengths of their respective cases.

The following morning, the three met again. During this period Collins and Colonel West "took a walk" to discuss the issue. Colonel West was considering some possible percentages and seemed to be interested in testing them on the neutral before he discussed them with Dr. Hehir or others. Dr. Hehir and Dr. Collins also walked in the warm Arizona sunshine and discussed "numbers." It appeared to Collins that the two were probably quite close to each other in percentage terms, although neither had proposed the numbers that actually were arrived at later in the day. Collins left at noon because of a previously scheduled meeting; the agreement was reached later that afternoon.

### **The Agreement**

Dr. Hehir and Colonel West settled the issue by agreeing on a Cost Allocation Agreement that allocated a proportionate share of agreed costs 2/3 for Goodyear and 1/3 for DOD. But, the agreement was contingent upon Goodyear signing the consent agreement with EPA. Goodyear was also afraid that the EPA might impose high costs on them for past expenses at the site that would not be shared by DOD. The next day, the attorneys for Goodyear flew to San Francisco, got an agreement that the cost increases would be only \$175,000, and on that basis they signed the consent decree and the mini-trial cost allocation was consummated.

### **Conclusion and Aftermath**

It appears that all parties were generally satisfied with the mini-trial and the outcome. This writer talked to the Goodyear Corporation, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the MLS and all seemed to feel that the mini-trial expedited the agreement and that the allocation agreement was reasonable.

A number of the participants and observers contacted for this study indicated that the mini-trial itself was well managed and skillfully conducted. Conforming to the timetable and process agreed upon in the mini-trial agreement was seen as vital. In some mini-trials the schedule has been difficult to maintain.

The parties also generally shared the opinion that the role of the neutral was helpful and important both in regard to the conduct of the mini-trial and to the negotiations among the senior officials.

Perhaps most importantly, the apportionment of costs and the process of achieving a negotiated settlement set the basis for a "partnership" for cleaning up the site. The cleanup process which is managed by the Goodyear company calls for them to bill the DOD for their share. The basis for these costs and their appropriate documentation may generate issues and disagreement. In the spirit of cooperation which was fostered by the mini-trial experience, the negotiators included a disputes clause in the agreement for cost allocation. This clause calls for the parties to explore ADR to resolve any future disputes regarding the cleanup.

Mini-trial uses in other Superfund cases might be appropriate, but it should be noted that this particular case was simplified by the fact that there were only two parties, and both had substantial resources. Also, the contamination of the groundwater was generally from one chemical--TCE--rather than different contaminants contributed by different parties, thus raising the issue of qualitative contributions to the general problem. As Mr. Mahon of the Corps of Engineers observed, "If we couldn't make a mini-trial happen in this case, we wouldn't be able to in any case."

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